Supreme Court, U.S.
FILED
SEP 5 - 2008
OFFICE OF THE CLERK

No. 07-1524

In the Supreme Court of the United States

CARLOTA COPPER COMPANY, PETITIONER

v.

FRIENDS OF PINTO CREEK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in setting aside the United States Environmental Protection Agency's issuance of a National Pollution Discharge Elimination System permit on the ground that it was inconsistent with 40 C.F.R. 122.4(i), an EPA regulation implementing the Clean Water Act.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 12
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992) .. 8, 9, 13, 16, 17
Auer v. *Robbins*, 519 U.S. 452 (1997) 18
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 21
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 20
Braxton v. *United States*, 500 U.S. 344 (1991) 20
California v. *Rooney*, 483 U.S. 307 (1987) 21
Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, In re, 731 N.W.2d 502 (Minn. 2007) 12, 13, 15, 20
Crutchfield v. *State Water Control Bd.*, 612 S.E.2d 249 (Va. Ct. App. 2005) 14, 20
NCAA v. *Smith*, 525 U.S. 459 (1999) 14
NRDC v. *United States EPA*, 915 F.2d 1314 (9th Cir. 1990) 2
Sierra Club v. *Meiburg*, 296 F.3d 1021 (11th Cir. 2002) 2
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 18

Statutes, regulations and rule: Page

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1311 (§ 301) 2
33 U.S.C. 1311(b)(1)(C) (§ 301(b)(1)(C)) 2, 3
33 U.S.C. 1313 (§ 303) 3
33 U.S.C. 1313(c)(2)(A) 3
33 U.S.C. 1313(d) (§ 303(d)) 2
33 U.S.C. 1313(d)(1)(A) 3
33 U.S.C. 1313(d)(1)(C) 4
33 U.S.C. 1341 (§ 401) 6
33 U.S.C. 1342 (§ 402) 2
33 U.S.C. 1342(a)(1) 2
33 U.S.C. 1344 (§ 404) 5
33 U.S.C. 1362(11) 3
33 U.S.C. 1362(12) 2
33 U.S.C. 1362(14) 2
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 7
40 C.F.R.:
Section 122.2 ..... 10, 19
Section 122.4 5
Section 122.4(d) 17
Section 122.4(i) ..... *passim*
Section 122.4(i)(1) 9, 20
Section 122.4(i)(2) 9, 10, 11, 17, 19, 20
Section 124.19(d) 6
Section 130.2(i) 4

Regulations and rule—continued: Page

Section 130.2(j) 3
Section 131.3(b) 3
Section 131.3(e) 3
Section 131.10 3
Section 131.10(h) 3
Section 131.11 3
Sup. Ct. R.:
Rule 10(a) 14
Rule 10(c) 19

Miscellaneous:

Mehmet K. Konar-Steenberg, In re Annandale *and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 Wm. Mitchell L. Rev. 1375 (2008) 15

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 504 F.3d 1007. The opinion of the Environmental Protection Agency Environmental Appeals Board (Pet. App. 25-220) is reported at 11 Envtl. Admin. Dec. 692.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2007. A petition for rehearing was denied on March 7, 2008 (Pet. App. 221). The petition for a writ of certiorari was filed on June 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought to open a new copper mine in Arizona. Petitioner sought a permit to discharge copper-containing water into Pinto Creek, which has been identified by the State of Arizona under Section 303(d) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1313(d), as a body of water that has not attained water quality standards for dissolved copper. Pet. App. 3-4. The federal respondent, the Environmental Protection Agency (EPA or the Agency), issued a National Pollutant Discharge Elimination System (NPDES) permit to petitioner pursuant to Section 402 of the CWA, 33 U.S.C. 1342, authorizing the discharge. Pet. App. 5-7. The court of appeals held that the permit was invalid, concluding that, because there were not yet any "plans or compliance schedules" designed to bring Pinto Creek "into compliance with applicable water quality standards," *id.* at 15, issuance of the permit was inconsistent with 40 C.F.R. 122.4(i), an EPA regulation implementing the NPDES. Pet. App. 9-24.

1. Section 402 of the CWA authorizes EPA to issue NPDES permits for the discharge of pollutants from "point source[s]" if the permit conditions assure that the discharge complies with certain requirements, including those of Section 301 of the CWA, 33 U.S.C. 1311.[1] See 33 U.S.C. 1342(a)(1), 1362(12). Section 301(b)(1)(C) requires that NPDES permits include effluent limits as

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[1] A "point source" is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). EPA's permitting authority under the CWA is limited to point sources. See, *e.g.*, *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *NRDC* v. *United States EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990).

stringent as necessary to meet applicable water quality standards. 33 U.S.C. 1311(b)(1)(C). Effluent limits are restrictions on the quantities, rates, and concentrations of pollutants that may be discharged from point sources. 33 U.S.C. 1362(11).

Under Section 303 of the CWA, States develop water quality standards for water bodies within their boundaries. 33 U.S.C. 1313. Those standards, which are subject to EPA approval, have three components: (1) one or more "designated uses" of each water body or water body segment; (2) water quality "criteria" specifying the amounts of various pollutants that the water may contain without impairing designated uses; and (3) an antidegradation provision. 33 U.S.C. 1313(c)(2)(A). The first component essentially classifies water bodies based on their expected beneficial uses and sets goals for each water body segment. *Ibid.*; 40 C.F.R. 131.10. The second component reflects water quality criteria that are "expressed as constituent concentrations, levels or narrative statements" and are designed to attain and maintain each designated use. 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(b), 131.11. The third component focuses on protecting "[e]xisting uses" by generally prohibiting the degradation of water quality below the level that is necessary to maintain existing uses, which are those uses actually attained in the water body on or after November 28, 1975. 40 C.F.R. 131.3(e), 131.10(h).

The CWA also requires States to identify and list those water body segments where technology-based effluent limits are insufficient to achieve the applicable water quality standards, and which are therefore known as "[w]ater quality limited." 33 U.S.C. 1313(d)(1)(A); 40 C.F.R. 130.2(j). Once a State identifies a segment as water quality limited, Section 303 of the CWA requires

the State to develop total maximum daily loads (TMDLs) for individual pollutants in that segment. 33 U.S.C. 1313(d)(1)(C). A TMDL sets forth the total amount of a pollutant from point sources, non-point sources, and natural background that a water-quality-limited segment can tolerate without violating water quality standards. 40 C.F.R. 130.2(i). A TMDL comprises both "wasteload allocations" for point sources discharging into the impaired segment and "load allocations" for non-point sources and pollutants in the natural background of the segment. *Ibid.*

The relevant EPA permitting regulation applicable to petitioner provides in relevant part as follows:

> No permit may be issued:
>
> * * * * *
>
> (i) To a new source or a new discharger, if the discharge * * * will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of [the] CWA, and for which the State * * * has performed a pollutants load allocation [*i.e.*, a TMDL] for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to

> bring the segment into compliance with applicable water quality standards.

40 C.F.R. 122.4.

2. This case involves EPA's issuance of an NPDES permit authorizing petitioner to discharge pollutants, including copper, from its proposed mining operation into Pinto Creek, a water body listed by Arizona as impaired due to non-attainment of water quality standards for dissolved copper.

Petitioner's proposed mine will be located in part on lands in the Tonto National Forest, which is administered by the United States Forest Service (USFS). Pet. App. 36-37. As part of its mining operations, petitioner would construct several waste-rock-disposal areas, and several retention basins to capture stormwater runoff and sediment from waste rock. *Id.* at 38-39. It would also develop a wellfield along part of Pinto Creek and Haunted Canyon to supply water for its project. *Id.* at 40-41. Because pumping from that wellfield may reduce stream flows, USFS required petitioner to agree to augment stream flows to ensure the protection of aquatic and riparian resources. *Id.* at 41. Petitioner also planned to construct two channels to divert Pinto Creek and Powers Gulch around and away from, *inter alia*, its proposed main mining pit encompassing a copper source in Pinto Creek's streambed. *Id.* at 38. Petitioner obtained a permit from the U.S. Army Corps of Engineers authorizing those diversion channels under Section 404 of the CWA, 33 U.S.C. 1344. Pet. App. 38.

In 1998, EPA published a draft NPDES permit for petitioner's project, and held a public comment period and two public hearings. Pet. App. 41. The draft permit proposed, *inter alia*, to authorize stormwater discharges from each retention basin in the event of a storm larger

than the basins were designed to accommodate. *Id.* at 40, 41. In response to comments, two new conditions were added to the permit. The first required petitioner to offset stormwater discharges from the retention basins by remediating major sources of copper loadings to Pinto Creek at the Gibson Mine, a nearby abandoned mine site. *Id.* at 42. The second condition authorized petitioner to make periodic groundwater discharges to augment stream flow. *Id.* at 41, 42.

In June 2000, the Arizona Department of Environmental Quality (ADEQ) certified the permit (including the two new conditions) under Section 401 of the CWA, 33 U.S.C. 1341, as meeting state water quality standards. Pet. App. 42. In July 2000, EPA issued a final permit containing the two new permit conditions, as well as all of the conditions and requirements of the draft permit. *Ibid.*

In August 2000, the non-federal respondents (Friends of Pinto Creek, Grand Canyon Chapter of the Sierra Club, Maricopa Audubon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek) and other groups, filed a petition for review with EPA's Environmental Appeals Board (EAB), arguing, *inter alia*, that: (1) EPA must establish a final TMDL for Pinto Creek before issuing an NPDES permit allowing any discharges into Pinto Creek; and (2) EPA failed to provide sufficient public notice of the two new permit conditions. Pet. App. 26, 43. In November 2000, pursuant to 40 C.F.R. 124.19(d), EPA withdrew the two new permit conditions and obtained a stay from the EAB of the remaining permit terms. Pet. App. 43-44. EPA entertained public comments on the two new permit conditions and on a supplemental environmental assessment that analyzed those two new permit conditions under the

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. 44.

ADEQ and EPA jointly proposed a TMDL for Pinto Creek. Pet. App. 32 n.12. In April 2001, after a public comment period, EPA established the final Pinto Creek TMDL, which contained wasteload allocations for petitioner's project and the BHP Pinto Valley Mine (the only existing NPDES permittee on Pinto Creek), as well as load allocations for all other sources. *Id.* at 44, 148; see *id.* at 81-82, 90. In February 2002, EPA issued an Amended Record of Decision/Finding of No Significant Impact supporting the reissuance of the permit to petitioner, subject to the two new conditions. *Id.* at 6, 45.

In April 2002, the non-federal respondents (among other organizations) filed a second petition for review with the EAB, arguing, *inter alia*, that: (1) the permit should have covered the diversion channels because they are point sources; (2) petitioner's discharges will violate Arizona water quality standards for copper; and (3) EPA violated NEPA by failing to take the required "hard look" at the impacts of the discharges from the diversion channels, including impacts from copper-bearing groundwater diverted by a cutoff wall into the diversion channels and then into Pinto Creek. Pet. App. 6-7, 45, 178-179.

On September 30, 2004, the EAB entered its order denying review on all issues. Pet. App. 25-220. In doing so, the EAB proceeded on the premise that petitioner is required to comply with both sentences in 40 C.F.R. 122.4(i), and that petitioner must comply with clauses (1) and (2) of the second sentence even when an offset would result in a substantial net reduction of pollution in impaired waters. Pet. App. 13, 160, 163 n.101. After EPA issued a final NPDES permit, the non-federal respon-

dents filed a petition for review in the Ninth Circuit. They alleged that the permit violated the intent and purpose of the CWA, and failed to comply with the requirements of 40 C.F.R. 122.4(i) and NEPA. Pet. App. 7; see *id.* at 4.

3. On October 4, 2007, the court of appeals vacated the permit. Pet. App. 1-24. The court focused on construing Section 122.4(i), concluding, in relevant part, that EPA's interpretation of its own regulation was contrary to that regulation. *Id.* at 9-17.

a. In the court of appeals, EPA argued, as a threshold matter, that the non-federal respondents were seeking a complete ban on issuance of an NPDES permit to petitioner until after Pinto Creek meets water quality standards, and that such a ban would be contrary to *Arkansas* v. *Oklahoma*, 503 U.S. 91, 107 (1992). Gov't C.A. Br. 20. EPA pointed out that this Court's decision in *Arkansas* held that nothing in the CWA prohibits effluent discharges into waters already in violation of water quality standards, and that to construe the CWA as establishing a complete ban on such discharges might frustrate the construction of new facilities that would improve existing conditions in a water body. *Id.* at 20-21. On the latter point, EPA contended that the permit condition requiring petitioner's remediation of the Gibson Mine site would result in a net improvement of water quality in Pinto Creek. *Id.* at 21.

The court of appeals distinguished *Arkansas*, reasoning that the decision determined that the CWA does not mandate a complete ban on discharges to impaired waters but that the statute *does* require measures "designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources."

Pet. App. 14 (quoting *Arkansas*, 503 U.S. at 108). The court also concluded that the non-federal respondents were not "argu[ing] for an absolute ban on discharges into" waters in violation of water quality standards, but were instead seeking to ensure that the "requirements" of Section 122.4(i) are met. *Id.* at 17. Likewise, the court stressed that it was not imposing a "complete ban" on new source discharges to impaired waters or creating any conflict with *Arkansas*, but merely requiring a "schedule[] to meet the objectives of the [CWA]" as contemplated by its reading of Section 122.4(i). *Id.* at 13, 16.

b. The court of appeals rejected EPA's interpretation of Section 122.4(i). As an initial matter, the court found that the "plain language" of the first sentence of Section 122.4(i)—providing that "[n]o permit may be issued * * * [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards" —is "very clear" that no permit may issue to a new source if its discharges will contribute to the violation of water quality standards. Pet. App. 10. Then, in considering EPA's contention that the Gibson Mine remediation would offset petitioner's discharges and thus neither cause nor contribute to a violation of a water quality standard, the court stated conclusorily that neither the CWA nor the regulation provides for such an exception "when the waters remain impaired and the new source is discharging pollution into that impaired water." *Id.* at 10-11. The court noted, however, that "[t]he regulation *does* provide for an exception" for such a discharge when a TMDL has been established and the new source demonstrates that the requirements of 40 C.F.R.

122.4(i)(1) and (2) are met. Pet. App. 11 (emphasis added).

The court focused on Section 122.4(i)(2), which requires a permit applicant to demonstrate that existing dischargers in an impaired segment are subject to a compliance schedule designed to bring that segment into compliance with applicable water quality standards. Pet. App. 12-13. EPA argued that clause (2) applies only to point source dischargers with NPDES permits, because EPA's permitting authority under the CWA is limited to point sources, and the term "*[s]chedule of compliance*" is defined in 40 C.F.R. 122.2 as a schedule of remedial measures included in a *permit*. EPA C.A. Br. 32-33. EPA contended that clause (2) was satisfied in this case because there were only two permitted point source dischargers to Pinto Creek. *Id.* at 34. One of those dischargers (petitioner) is not subject to a compliance schedule because it is not an existing discharger, and the other discharger is not subject to a schedule to bring it into compliance because it is already complying with the requirement in its permit that its discharges meet applicable water quality standards for copper. EPA also relied upon its prior interpretation of the regulation to support this argument. *Id.* at 32, 34.

The court of appeals rejected EPA's interpretation of Section 122.4(i)(2), holding that "under the plain language of the regulation, compliance schedules are not confined only to 'permitted' point source dischargers, but are applicable to 'any' point source." Pet. App. 12. Because the existing point-source dischargers into the segment of Pinto Creek were not subject to schedules to bring Pinto Creek into compliance with water quality standards, the court held that the plain requirements of Section 122.4(i)(2) were not met. *Id.* at 13. The court

concluded that "[t]he error of both the EPA and [petitioner] is that the objective of [Section 122.4(i)(2)] is not simply to show a lessening of pollution, but to show how the water quality standard will be met if [petitioner] is allowed to discharge pollutants into the impaired waters." *Id.* at 16.

c. The court then discussed how EPA, as the permitting authority, would need to proceed in a situation where subjecting the permitted point sources to a compliance schedule would not alone be able to achieve water quality standards. In that event, the court said, before issuing a permit to the new source or new discharger, EPA would have to establish, for other point sources, compliance schedules designed to achieve water quality standards. Pet. App. 16. If reductions from point sources would not be sufficient to achieve water quality standards, the court stated that a permit could not issue unless the State or petitioner agreed to establish schedules to limit pollution from non-point sources sufficient to achieve water quality standards. *Ibid.* The court went on to reason that it was not impinging on EPA's enforcement discretion because its reading would not require EPA to act against point sources whose discharges into Pinto Creek violate the CWA or require "judicial review of * * * EPA's ordering of priorities in any failure to act." *Id.* at 17. Instead, the court held, the requirements of the regulation are conditions that must be met before a permit may be issued to a new source discharging into impaired waters, and "EPA remains free to establish its priorities; it just cannot issue a permit to a new discharger until it has complied" with the regulation. *Ibid.*

ARGUMENT

The court below erred in concluding that the issuance of an NPDES permit to petitioner was inconsistent with 40 C.F.R. 122.4(i). Nevertheless, that error presents only a case-specific application of settled principles of agency deference. There is no conflict with a decision of this Court or with decisions of lower courts on the interpretation of the regulatory provision that was central to the decision below. Under the circumstances, this case does not warrant further review by this Court.

1. Petitioner chiefly contends (Pet. 16-20) that the court of appeals' decision conflicts with a decision of the Minnesota Supreme Court, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (2007) (*Cities of Annandale & Maple Lake*). The Ninth Circuit did not address that case, but there is no conflict between the two decisions.

a. In *Cities of Annandale & Maple Lake*, the Minnesota Pollution Control Agency—which had been authorized by EPA to administer the NPDES program in Minnesota, see 731 N.W.2d at 516—issued a permit for a new wastewater-treatment plant. *Id.* at 506. The state agency found that the proposed new plant, when operating at capacity, would increase phosphorous discharges to the North Fork of the Crow River by 2200 pounds per year above the discharges from two preexisting facilities, but it issued the permit after concluding that, under Section 122.4(i), the increase would not contribute to the violation of water quality standards in the impaired waters of the downstream Lake Pepin. *Ibid.* The agency found that the new plant's increased discharge of phosphorus would be offset by a 53,500-pounds-per-year decrease in discharges resulting from

an upgrade to another plant in a nearby city. *Id.* at 506-507. The agency also found that "the dissolved oxygen effect from the proposed plant would not contribute to the violation" of water quality standards in Lake Pepin due to its distance from the proposed plant. *Id.* at 507-508.

In considering Section 122.4(i), the Minnesota Supreme Court first held that the regulation—specifically the phrase "cause or contribute to the violation of water quality standards" in the first sentence—was unclear and susceptible to more than one reasonable interpretation. 731 N.W.2d at 522. It then concluded that the state agency's interpretation of that phrase was reasonable, in light of the broad phrasing of the regulatory text, its context in the CWA, and the need for the agency to make a range of policy judgments based on its scientific and technical knowledge. *Id.* at 524. The court noted that the state agency's interpretation was supported by this Court's reasoning in *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992), by the decision of the EAB in this case (before its result had been vacated by the Ninth Circuit), and by positions taken by EPA in other litigation. *Ibid.*

b. The decision below does not conflict with *Cities of Annandale & Maple Lake* because that case involved a different factual scenario and focused on a different part of the applicable regulation. The Minnesota case involved the validity of the state agency's interpretation of the phrase "cause or contribute to the violation of water quality standards" in the *first* sentence of Section 122.4(i), in the context of permitting a new source of discharges to an impaired water segment that did not have a TMDL. 731 N.W.2d at 517 & n.11. Because there was no pollutants load allocation, the Minnesota Supreme

Court had no occasion to consider or apply the *second* sentence of Section 122.4(i).[2]

The decision in this case, by contrast, expressly turned on the second sentence of the regulation, which became relevant because a TMDL had already been established for Pinto Creek. Pet. App. 11, 19-20.[3] The court of appeals repeatedly stressed that its decision was based upon the second sentence of Section 122.4(i), and in particular on clause (2) of that sentence. See *id.* at 13, 15-16, 17, 20, 23. Apart from a passing statement that "nothing in the [CWA] or the regulation" provides an "exception for an offset" when the preconditions for the second sentence are not satisfied, *id.* at 10, the Ninth Circuit did not address the language in the first

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[2] Petitioner argues (Pet. 18-19) that the Ninth Circuit's decision also conflicts with *Crutchfield* v. *State Water Control Board*, 612 S.E.2d 249 (Va. Ct. App. 2005). Because *Crutchfield* was not a "decision by a state court of last resort," it could not create the type of conflict contemplated by Supreme Court Rule 10(a). In any event, as petitioner acknowledges (Pet. 18), *Crutchfield* "followed the same approach" as *Cities of Annandale & Maple Lake* and addressed only the first sentence of Section 122.4(i). See 612 S.E.2d at 255. In fact, the Virginia intermediate appellate court went further, specifically holding that "the second sentence of the regulation" did not apply because there was no pollutant load allocation. *Ibid.* *Crutchfield* is thus readily distinguishable from this case.

[3] Petitioner nonetheless suggests (Pet. 23-24 n.10) that this Court could decide this case on the basis of the first sentence of Section 122.4(i), because the applicability of that sentence is "encompassed within the question[] presented for review." But, as petitioner concedes (*ibid.*), both the EAB and the court of appeals "assume[d], without deciding," that the permit in this case would be valid only if it independently satisfied the second sentence of Section 122.4(i). See Pet. App. 13, 163 n.101. Petitioner provides no reason for this Court to depart from its customary practices and decide that issue in the first instance. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

sentence of Section 122.4(i) that was construed in *Cities of Annandale & Maple Lake*.[4] As a result, there is no conflict between the two courts' holdings.

c. To the extent that there is any tension between the approach of the Minnesota Supreme Court and that of the Ninth Circuit, it consists in how much deference they gave to government agencies for the interpretation of regulations implementing the NPDES program. See Pet. 19-20. But, in deferring to the Minnesota Pollution Control Agency, the Minnesota court drew on *state* case law and a *state* statute codifying some aspects of agency deference, and it consulted federal law only by analogy. See 731 N.W.2d at 513-516; see also Mehmet K. Konar-Steenberg, In re Annandale *and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 Wm. Mitchell L. Rev. 1375 (2008) (describing ways in which the deference analysis in *Cities of Annandale & Maple Lake* departs from federal agency-deference doctrine). Here, of course, the relevant principles of deference stem from federal law, and there is thus no direct conflict on the issue of deference either.

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[4] The Ninth Circuit's passing observation that the CWA and regulations do not contain an "exception for an offset" is itself ambiguous. The court may simply have meant that there is no express provision in the CWA or regulations that in terms provides an "exception" in situations involving an "offset." If so, the court's conclusion was correct but ultimately irrelevant. Whether the phrase that *does* appear in the first sentence of Section 122.4(i) (*i.e.*, "will cause or contribute to the violation of water quality standards") is properly construed to be met where there will be an offset is a different question, which the Ninth Circuit did not address. Indeed, elsewhere in its decision the court appeared to contemplate that any offset created by remediation of the Gibson Mine *could* be taken into account. See Pet. App. 20-21.

2. Petitioner also argues (Pet. 20-22) that the Ninth Circuit's decision conflicts with this Court's decision in *Arkansas* v. *Oklahoma*, *supra*. There is not, however, a conflict between the two decisions, and petitioner exaggerates (Pet. 24-25) the Ninth Circuit's holding by claiming that its "practical effect is to virtually—if not categorically—prohibit all * * * discharges" into impaired waters.

a. In *Arkansas*, EPA issued an NPDES permit authorizing a new sewage treatment plant to discharge into an unnamed stream in northwestern Arkansas. 503 U.S. at 95. The effluent flowed 17 miles downstream before it entered the Illinois River at a point 22 miles upstream from the border with Oklahoma. *Ibid.* The permit contained limits on the quantity, content, and character of the discharge. *Ibid.* Oklahoma challenged the permit, alleging that the discharge violated Oklahoma's water quality standards, which prohibited degradation of water quality in the upper Illinois River, including the portion immediately downstream from the state line. *Ibid.* EPA agreed that the permit needed to satisfy Oklahoma's standards, but found that they had been met. *Id.* at 97. The Tenth Circuit reversed the issuance of the permit on different grounds. *Id.* at 98.

This Court then reversed the Tenth Circuit. It first concluded that EPA's requirement that the discharge comply with Oklahoma's water-quality standards was a reasonable exercise of EPA's substantial statutory discretion, *Arkansas*, 503 U.S. at 104-107, and then addressed the Tenth Circuit's conclusion that the CWA prohibits any discharge of effluent that will reach waters that are already in violation of existing water quality standards, *id.* at 107-108. The Court rejected that interpretation of the statute, concluding that "the parties

have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards." *Id.* at 108. It thus rejected a "categorical ban" that "might frustrate the construction of new plants that would improve existing conditions." *Ibid.*

b. There is no conflict between *Arkansas* and the Ninth Circuit's decision in this case, because *Arkansas* did not address Section 122.4(i). Instead, this Court based its decision on the language of the CWA itself, see 503 U.S. at 107-108, and on certain state-law water quality standards made applicable by 40 C.F.R. 122.4(d), see 503 U.S. at 109-114. In contrast, the Ninth Circuit squarely predicated its decision in this case on 40 C.F.R. 122.4(i)(2). See, *e.g.*, Pet. App. 12-13, 15-16 & n.2. Moreover, the Ninth Circuit specifically disclaimed the imposition of any "complete ban" or "absolute ban" on discharges into impaired water bodies. *Id.* at 13, 17. Indeed, it affirmatively noted that EPA can use its broad discretion to establish priorities among point sources and it can issue permits for new dischargers, so long as there are compliance schedules, *id.* at 16-17.[5]

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[5] Petitioner is incorrect in characterizing the Ninth Circuit as holding "that—if compliance schedules for permitted point source dischargers are insufficient to achieve water quality compliance—*compliance schedules* must also be adopted for *non-point* source dischargers." Pet. 26 (first emphasis added). In fact, the court stated that "[i]f there are not adequate point sources to [protect water quality standards through the application of compliance schedules], then a permit cannot be issued unless the state or [petitioner] agrees to establish a *schedule* to limit pollution from a non-point source or sources sufficient to achieve water quality standards." Pet. App. 16 (emphasis added). Thus, while the court of appeals spoke of the need for schedules for non-point sources, it did not specifically refer to "compliance schedules," a term that, as petitioner recognizes (Pet. 26), can apply only to point sources. EPA

Thus, the decision below does not virtually or categorically prohibit the permitting of new sources or new dischargers to impaired water bodies under the CWA, and there is no conflict with *Arkansas*.

3. Petitioner next argues (Pet. 29-35) that the court of appeals failed to apply the appropriate standard of review by not deferring to EPA's interpretation of its own regulation, pursuant to the established principle that "[t]he agency's interpretation of its own regulation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Pet. 29 (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)); see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). EPA agrees that the court of appeals did not properly apply that principle when establishing its interpretation of Section 122.4(i).

a. The court of appeals did not acknowledge the substantial deference to which EPA is entitled in interpreting its own regulations, as set forth in cases such as *Auer* and *Thomas Jefferson University*. The court of appeals instead disagreed with EPA's interpretation of

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thus reads the court's reference to a "schedule" in this context as a type of plan (*e.g.*, a TMDL implementation plan) that a State or EPA would develop to address a reduction in non-point-source pollution as necessary to achieve water quality standards.

Similarly, EPA does not agree with petitioner's contention (Pet. 26) that the Ninth Circuit imposed any additional requirement by means of its brief reference to clause (1), which merely noted (Pet. App. 11-12) that, in the absence of any showing in the record of this case that load allocations "represent the amount of pollution that is currently discharged," the contention that sufficient remaining load allocations existed was merely theoretical. EPA believes that, in most cases, the TMDL or permit fact sheet will provide the basis for a permitting authority's conclusion that there are sufficient remaining load allocations.

Section 122.4(i)(2), based on a conclusory statement that EPA's interpretation—under which the requirement of "compliance schedules" pertains only to point sources for which there is a permit—did not comport with the court's view of the "plain language of clause (2)." Pet. App. 12.

But the court made no effort to explain how clause (2) requires "schedules" for *non*-point-source dischargers. Pet. App. 16. EPA had interpreted the phrase "existing dischargers" in clause (2) as including only point-source dischargers that are existing permit holders. *Id.* at 174-175. That interpretation is consistent with, and supported by, the extent of EPA's permitting authority under the CWA, which is limited to point sources. Moreover, the clause, by its terms, applies to "existing dischargers * * * *subject to compliance schedules.*" 40 C.F.R. 122.4(i)(2) (emphasis added). Because non-point-source dischargers are not subject to EPA's permitting requirements, it follows that the regulations limit the phrase "existing dischargers * * * subject to compliance schedules" to point sources. Furthermore, because the regulations define the term "*[s]chedule of compliance*" as a "schedule of remedial measures included in a 'permit,'" 40 C.F.R. 122.2, EPA had construed the reference in 40 C.F.R. 122.4(i)(2) to existing dischargers subject to compliance schedules as applicable to *existing* permit holders.

b. Despite the flaws in its legal analysis, the Ninth Circuit's decision does not reflect a decision about an "important federal question" for purposes of Supreme Court Rule 10(c). The principal defects in the court of appeals' analysis were its case-specific failure to acknowledge the well-established principles of agency deference set forth in the line of cases stemming from

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and its belief that the terms of the particular regulatory provision foreclosed EPA's interpretation. There is no circuit conflict regarding the interpretation of Section 122.4(i)(2), and, to the extent the Ninth Circuit's decision creates confusion, EPA may amend the regulation to clarify its intention. This Court does not normally grant certiorari to review an assertedly erroneous interpretation of a regulatory provision that can be changed by administrative action. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

4. Finally, petitioner argues (Pet. 35-39) that the Ninth Circuit's decision imposes a "virtual *de facto* moratorium" on the issuance of permits for new discharges into impaired waters, improperly restricting the discretion of permitting authorities to issue permits with conditions that would reduce net pollution and improve water quality.

To the extent that dictum in the court of appeals' opinion (Pet. App. 10-11) implies that the first sentence of Section 122.4(i) could not be reasonably interpreted to allow for the consideration of an offset, it is erroneous. The phrase "cause or contribute to the violation of water quality standards" is subject to more than one reasonable interpretation, and any court actually addressing its applicability would need to consider and defer to EPA's own reasonable interpretation of that phrase. Cf. Pet. App. 164-168; *Cities of Annandale & Maple Lake*, 731 N.W.2d at 517-522; *Crutchfield* v. *State Water Control Bd.*, 612 S.E.2d 249, 255 (Va. Ct. App. 2005).[6] But "[t]his Court 'reviews judgments, not state

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[6] By the same token, the court of appeals did not actually hold that the permit independently failed to satisfy Section 122.4(i)(1). The

ments in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Accordingly, there is no need to address at this point whether EPA and state agencies may consider offsets or net effects on pollution in determining whether a proposed project would "cause or contribute to the violation of water quality standards" under the first sentence of Section 122.4(i).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008

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opinion devoted only one murky sentence to clause (1), and even that sentence depended on the assumption—apparently imported from clause (2)—that there needed to be a "plan * * * to bring Pinto Creek within the water quality standards." Pet. App. 11.